the oral agreement, namely, in the Muslim year 1358. There is no question of specific performance in reference to the third piece since the second defendant has sold it to another person. The question then is what is the measure of damages? In my opinion, the measure of damages should be the differences between the price that the plaintiff should pay for the land under the oral agreement and the price of the land in 1958 when the defendants repudiated the contract. (See *Ridley* v. *De Greets*[3]).

(After a short adjournment we obtained counsel's agreement that the measure of damages should be $8,000 for the loss of this land to the plaintiff).

I would therefore allow the appeal, set aside the judgment of the court below and make the following order:

1. That the defendant shall sell back the lands comprised under S.P.K. 3165 and 3166 to the plaintiff as the administrator of his mother's estate on his payment of $600.
2. That the defendant shall pay the plaintiff $8,000 as damages for the loss of land comprised in S.P.K. 3163.
3. The defendants will pay costs here and in the court below. The plaintiff's deposit of $500 will be paid back to him.

Gill and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *Oo Gin Sun & Co.; Karpal Singh, Wong & Co.*

LEE MOOI v. NAM SING MINING, KEPONG

[A.C.J. (Mohamed Azmi J.) August 25, 1972]

[Kuala Lumpur — Civil Appeal No. 49 of 1971]

Workmen's Compensation — Whether deceased a workman — Tests to be applied — Workmen's Compensation Ordinance, 1952, s. 2(1).

In this case the deceased, at the time of his death, was a member of a gang of twenty five workers whose duty it was to extract tin in the respondent's mine at Kepong. The terms and conditions of the service of the gang were contained in an agreement which was executed by all the twenty five workers of the one part and the respondent of the other part. The deceasd died whilst tightening up the screws of the cover to a water pump at the mine. The cause of death was heart failure. The arbitrator under the Workmen's Compensation Ordinance held that the deceased was not a workman within the meaning of the Ordinance and dismissed the claim of his widow, the appellant, for compensation. The appellant appealed to the High Court.

Held: there was very little evidence to show that the respondent had the right to exercise control over the deceased and therefore the arbitrator was right in holding that the deceased was not a workman under section 2(1) of the Ordinance.

Cases referred to:-

(1) *Bata Shoe Company (Malaya) Ltd.* v. *Employees Provident Fund Board* [1967] 1 M.L.J. 120 at p. 121.

(2) *Montreal Locomotive Works Ltd.* v. *Montreal & A. G.* [1947] 1 D.L.R. 161 at p. 169, P.C.

(3) *Zuijis* v. *Wirth Bros Pty. Ltd.* (1955) 93 C.L.R. 87.

(4) *Bobby* v. *W. M. Crosbie & Co Ltd.* (1916) 114 L.T. 244.

(5) *Tay Choon Keng* v. *Chop Choong Joo* [1953] M.L.J. 76.

CIVIL APPEAL.

Wong Chong Wah for the appellant.

K. K. Lam for the respondent.

Mohamed Azmi J.: This is an appeal against the decision of the arbitrator appointed under section 30 of the Workmen's Compensation Ordinance, 1952 wherein the arbitrator held that one Lim Chuan, deceased, the husband of the appellant, was not a 'workman' within the meaning of the Ordinance and thereby dismissed the appellant's application for compensation against the respondent.

The facts of the case are not in dispute. At the time of his death, the deceased was a member of a gang of twenty-five workers, whose duty was to extract tin in the respondent's mine at Kepong. The terms and conditions of the service of the gang are contained in an agreement written in Chinese dated May 1, 1967 which was executed by all the twenty-five workers of the one part and the respondent of the other part. The deceased died on February 11, 1968 whilst tightening up the screws of the cover to the water pump at the mine by using two spanners. The cause of death was coronary arteriosclerosis with heart failure.

There are three grounds of appeal. First, it is argued that the learned arbitrator erred in law in failing to consider the written agreement dated May 1, 1967 as a whole, and in not coming to the conclusion that upon the proper construction of the agreement there was a relationship of employer and workman between the respondent and the deceased. Secondly, the learned arbitrator erred in law in that he failed to construe the said written agreement first without inquiring into the fact situation of the case; and lastly, the learned arbitrator erred in law and fact in holding that the deceased was not a workman under section 2(1) of the Ordinance.

Taking the first two grounds together, it is convenient at this stage to refer to the terms of the agreement in Chinese. They may be tabulated as follows: —

(1) Nam Sing Mining Company opened a tin mine at Kepong.

(2) Both parties agreed to the price of $36 per hundred-weight of tin ore produced on the basis of seventy hundred-weight per 'palong' each month.

(3) The total for two 'palongs' shall be 140 hundred-weight.

(4) The management shall be responsible for all the machineries, furniture and workmen's compensation matters.

(5) Lodging but not food is provided.

(6) This agreement has been agreed by both parties and becomes valid immediately.

(7) In future, if either party has any dissatisfaction, the party concerned shall give one month's notice officially before it could be effective.

(8) It is feared that there is no evidence later on. Thus two copies of the agreement have been made and either party shall hold a copy as proof.

Referring to the agreement, the learned arbitrator was of the view that it was part of a bigger agreement based on a certain understanding of the existing working system. As such, he was of the view that the written agreement did not cover this case exclusively but should be read with that part of Lai Woon's evidence relating to the working terms. It should be noted that Lai Woon is one of the signatories to the written agreement and he was a witness called by the appellant during the inquiry held before the Junior Assistant Commissioner of Labour. Before the arbitrator, both parties did not adduce any evidence but agreed that they would argue their case based on the evidence recorded at the inquiry held under section 27 of the Ordinance. Having regard to the nature of the written agreement, I am in agreement with the learned arbitrator that in determining whether or not the deceased was a 'workman', it is necessary to consider both the terms of the agreement and the evidence of Lai Woon together. In my judgment, there is no merit in the first two grounds of appeal.

As regards the last ground of appeal, the learned arbitrator came to the conclusion that the deceased was not a workman under section 2(1) of the Ordinance after applying the various tests established by decided cases in determining whether a contract is one of service or for service. After referring to the "control test" as enunciated by Gill J. (as he then was) in the case of *Bata Shoe Company (Malaya) Ltd.* v. *Employees Provident Fund Board*,[1] and the "four-fold test" in *Montreal Locomotive Works Ltd.* v. *Montreal & A-G*,[2] and also to the "when and where test" in *Znijis* v. *Wirth Bros. Pty. Ltd.*,[3] he held that the deceased was not a workman. From his judgment, it seems clear that he had applied the traditional test of control and dismissal.

Whatever test may be applied, it is clear from the authorities that whether or not a particular contract is a contract of service is a question of fact depending on the particular circumstances of each case, as none of the factors in any particular test is by itself conclusive. In the present case, there was evidence before the arbitrator that each of the twenty-five signatories to the agreement was referred to as a "contractor". This factor alone is of course not decisive. There was also a term in the agreement that each contractor was to be paid $36 per pikul of tin extracted subject to a minimum payment based on 70 pikuls per month. Thus, should the mine yield less than 70 pikuls in any one month, the team would nevertheless be paid for a presumed extraction of 70 pikuls. This also meant that the more ore that was extracted, the more the team would earn. From the evidence of Lai Woon, the total sum received from the respondent was shared among the members equally, based on the number of working days put in by each worker. Although the work-record book was kept by a certain Wong Tuck, one of the signatories to the agreement, who was also authorised to collect payment from the company, I agree with the finding of fact of the learned arbitrator that he was not a supervisor or a kepala, but was only a kind of spokesman for the team. This is clear from the evidence of Lai Woon and corroborated to a certain extent by Mr. Yap Pow Khean, the manager of the respondent company, as to the power of hiring and firing of the workers. Under re-examination, Lai Woon did say that Wong Tuck received instruction from the company but, if any of the workers was inefficient or guilty of misconduct, the respondent's mine supervisor would complain to Wong Tuck. When this was done, the team as a whole would decide whether or not to dismiss him. Similarly, if one of the workers decided to quit, the team would decide who was to replace him. From the above evidence, two material factors are established. First, the position of Wong Tuck and the other signatories to the agreement is that they are partners *inter se*, and that all of them are independent contractors *viz-a-viz* the respondent. Secondly, the respondent was only interested in the quantity of tin extracted and had no power of hiring or firing; nor the control in the manner in which the workers carried out their work. The respondent merely had the power to complain, but not the power to employ or dismiss the workers. It is argued by learned counsel for the appellant that the fact the respondent had agreed to be responsible for workmen's compensation is an indication that the respondent always treated the workers as coming within the meaning of the word workmen under section 2(1) of the Ordinance. To my mind, there is a fallacy in this argument. Assuming that an employer does not take out any insurance to cover his workers, does it necessarily follow that the service rendered is for service and not of service? On this issue, I am inclined to agree with the submission of learned counsel for the respondent that the fact that the respondent had agreed to be responsible for workmen's compensation does not *ipso facto* make them "workmen". I agree that this is merely a contract between the respondent and the independent contractors whereby they agreed to adopt the payment of compensation under the First Schedule of the Ordinance. Learned counsel for the appellant had referred to *Bobby* v. *W. M. Crosbie & Co. Ltd.*[4] and *Tay Choon Keong* v. *Chop Choong Joo*.[5] Those cases are distinguishable in that, unlike in the present case, there was evidence that there was in fact a head-man in the gang. Further, there was also evidence of a certain practice of long standing in the first case as regards riverside labourers, and in the second case, the working arrangement was of long standing and involved considerable employers in Singapore. In the present case, although both Lai Woon and Mr. Yap Pow Khean had referred to the working arrangement between the gang and the respondent as "Pok Chou" system, there is no evidence adduced that this system is prevailing in Chinese tin mines in this country. At the outset of the hearing of this appeal, counsel for both parties have agreed that the question of "Pok Chou" system is not in issue. The present case should not, therefore, be taken as a precedent that such a system cannot under any circumstances constitute a contract of service. As there is very little evidence that respondent had the right to exercise any control over the deceased, the last ground of appeal must also fail. The essential matter to be considered is the amount of control exer-

cised over the person rendering the service by the person to whom they were rendered. The greater the amount of such direct control, the more clear it is that the contract is one of service; the lesser the control, the more clear that it is a contract for service.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; K. K. Lam & Co.*

CHIN SEE LIAN v. NG WAN PIT

[O.C.J. (Mohamed Azmi J.) October 14, 1972]

[Kuala Lumpur — Civil Suit No. 1470 of 1970]

Landlord and Tenant — Whether relationship between parties that of landlord and tenant or licensor and licensee — Intention of parties — Whether agreement a sham to circumvent Control of Rent Ordinance, 1956 — Whether plaintiff estopped from alleging agreement was a sham — Evidence Ordinance, 1950, s. 115.

The defendant was in occupation of the ground floor of certain premises under a written agreement, under which it was agreed that the defendant should carry on a coffee shop business for a period of 60 months, at the expiration of which the defendant undertook to give up vacant possession of the premises. Subsequently the premises were sold by the original owner and the plaintiff eventually become the owner. Thereafter the defendant paid the amounts payable under the agreement to the plaintiff. At the expiry of the 60 months period the plaintiff requested the defendant to give up the premises but the defendant refused to comply with his request, claiming that he was the tenant of the premises and was protected under the Control of Rent Ordinance, 1956.

Held: (1) in this case the circumstances and conduct of the parties showed that all that was intended was that the defendant should have a personal privilege as a licensee or agent under the contract to run the coffee shop at the premises for a period of 60 months with no interest in the land at all. At the expiry of that period, the plaintiff was entitled to have the premises back;

(2) the defendant in this case was estopped from alleging that the agreement was a sham or was a camouflage to bypass the Rent Control Ordinance or was an agreement to contract out of the said Ordinance and from asserting that he was a tenant of the premises.

Cases referred to:-

(1) *Isaac* v. *Hotel de Paris Ltd.* [1960] 1 All S.R. 348.

(2) *Pong Khee Kwei* v. *Tan Sai Kuy* [1972] 2 M.L.J. 48.

(3) *Booker* v. *Palmer* [1942] 2 All S.R. 674.

(4) *Sarah Chunder Dey & Ors.* v. *Gopal Chander Laka & Ors.* 19 I.A. 203.

CIVIL SUIT.

V. K. Palasuntharam for the plaintiff.

Leong Tuck Onn for the defendant.

Mohamed Azmi J.: By an agreement dated March 16, 1967, the plaintiff bought from one Tay Song Chay the whole piece of land held under Selangor Certificate of Title No. 9268, Lot 64 Section 20, in the town and district of Kuala Lumpur. On this land is a rent controlled building known as No. 29, Jalan Foch. At the time of purchase, the defendant was in occupation of the ground floor of the building (hereinafter referred to as "the premises") by virtue of an agreement dated September 9, 1965 entered into between him and Tay Song Chay. Under this 1965 agreement, it was agreed that the defendant should carry on the coffee shop business of Tay Song Chay at the premises for a period of sixty months, at the expiration of which the defendant undertook to deliver vacant possession of the premises. Since the property was sold to the plaintiff during the currency of the 1965 agreement, Tay Song Chay also assigned the said agreement to him. It is not in dispute that Tay Song Chay was holding at the time of the 1965 agreement a coffee shop licence to carry on the business of a coffee shop and had been carrying on such a business at the premises under the style of Lien Fatt Company for many years previously, and was the owner of all the furniture, chattels and effects as described in the schedule to the said agreement which were at all material times being used for the purpose of the coffee shop business. Under the said agreement, in consideration of the payment of $515 per month as "guaranteed net profit" by the defendant — who is referred to as the "contractor" — to Tay Song Chay — who is referred to as the "owner" — the defendant was allowed to carry on the said coffee shop business for a period of sixty months with effect from October 1, 1965. Pursuant to the said agreement, the defendant paid a deposit of $3,000 to Tay Song Chay and he also paid a sum of $12,000 as advanced payment, and the defendant should thereby be entitled to deduct a sum of $200 from the monthly guaranteed net profit of $515 payable by him to Tay Song Chay. The defendant should therefore be liable to pay only the balance of the guaranteed net profit amounting to $315 per mensem. The plaintiff became the registered owner of the property on March 29, 1967; and by letter dated April 14, 1967, the defendant was notified of the said sale and the assignment of the 1965 agreement. Pursuant to oral notices of the same given earlier on by Tay Song Chay and the plaintiff, the defendant started to pay the "guaranteed net profit" of $315 per month to the plaintiff instead of to Tay Song Chay with effect from April 1967, and this went on till September 1970. By letter dated July 11, 1970, the plaintiff through her solicitors notified the defendant that in accordance with clause 19 of the said agreement the sixty month period would expire at the end of September 1970 and he was therefore requested to deliver vacant possession of the premises on or before September 30, 1970, subject to terms and conditions of the agreement including the refund to the defendant of the deposit of $3,000 under clause 4. The defendant refused to comply with the said notice. Consequently, by a specially indorsed writ dated November 16, 1970, the plaintiff filed the present suit claiming vacant possession of the premises. The claim is, therefore, based essentially on the 1965 agreement.

The main issue in this case is whether by the 1965 agreement a legal relationship of landlord and tenant had been created between Tay Song Chay and the defendant, or whether their relationship was merely that of licensor and licensee, or principal and agent. If the agreement did not create a tenancy, it follows that there was no tenancy between the plaintiff and the defendant and, as such, the plaintiff should be entitled to possession of the premises at the expiry